Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: October 16, 2003

GSBCA 16135

GRANT AFRICAN METHODIST EPISCOPAL CHURCH,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

J. Stanley Sanders, Los Angeles, CA, counsel for Appellant.

Amanda Wood, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **HYATT**.

DANIELS, Board Judge.

This case involves a lease between Grant African Methodist Episcopal Church (the Church), lessor, and the General Services Administration (GSA), lessee. During the final period of the lease, GSA paid less than its regular monthly rent on three occasions and did not pay any rent at all for the last part of the period. The Church claims that it is entitled to receive both (a) the amounts by which GSA's payments for the three months in question were less than the agency's regular monthly rent and (b) the regular monthly rent for the final two and one-half months of the period.

The Church elected to have the case considered under the Board's accelerated procedure, which is available where the matter in dispute is a monetary amount of $100,000 or less. See Board Rule 203 (48 CFR 6102.3 (2002)). Accordingly, our decision is being issued by the panel chairman with the concurrence of only one of the other judges assigned to the panel. We find for the Church on the first aspect of the dispute and for the Government on the second.

Findings of Fact

1. From 1971 until 2002, GSA leased from the Church office and related space at a location in Los Angeles, California. Complaint ¶ 4; Answer ¶ 4. On May 15, 1987, the two parties entered into the lease which is at issue here. Under this lease, GSA would rent from the Church office and related space at that location for five years. GSA, at its option, could renew the lease for an additional five years. The Church was required to furnish, as part of the rental consideration, janitorial and maintenance services. GSA was to pay rent monthly in arrears. Appeal File, Exhibit 1 at 1-2, 23-24.

2. Paragraph 4 of the lease stated:

> The Government may terminate this lease after the initial term at any time by giving at least 60 days' notice in writing to the Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the day after the date of mailing.

Appeal File, Exhibit 1 at 1.

3. The lease originally provided that the rental rate for its first five years was to be $173,893.80 per year ($14,491.15 per month). For the next five years, if GSA exercised its option, the rental rate was to be $236,268.75 per year ($19,689.06 per month). Appeal File, Exhibit 1 at 1. These rates were increased slightly, to $177,040.20 per year ($14,753.35 per month) and $240,543.75 per year ($20,045.31 per month), respectively, in December 1987. Id., Exhibit 3 at 1-2.

4. The lease also provided that the rental rates were subject to adjustment for changes in "operating costs" – "costs for cleaning services, supplies, materials, maintenance, trash removal, landscaping, water, sewer charges, heating, electricity, and certain administrative expenses attributable to occupancy." The amounts of the adjustments were to be commensurate with changes in a specified cost of living index. Appeal File, Exhibit 1 at 11-12. Paragraph 12 of the lease established a base amount of costs to be adjusted. Id. at 3. Over the years, rental rates were increased pursuant to the operating cost adjustment provision. E.g., id., Exhibits 4, 6, 7, 8.

5. On May 1, 1997, as the lease was about to expire, the parties amended it to extend it "for a period of 2 years 1 year firm" – through May 14, 1999. With the exception of two items not relevant to this dispute, the supplemental lease agreement (SLA), number 8, said that "[a]ll other terms and conditions of the lease shall remain in force and effect." Appeal File, Exhibit 9.

6. By May of 1999, when the lease as amended was again about to expire, the rental rate, as modified through the operating cost adjustment provision, was $251,475.80 per year ($20,956.32 per month). Appeal File, Exhibit 18 at 1, 3. On May 5, the contracting officer asked the Church's pastor to sign another SLA, extending the lease "for a period of 3 years 2 years firm." The SLA, as proposed by the contracting officer, would have eliminated the Church's responsibility for janitorial and maintenance services and decreased the annual rent from its then-current rate by $48,971.60, the amount the Government believed it would have to pay if it contracted separately for those services. Id., Exhibit 17 at 1. (The record shows that during 1998 and early 1999, the Government had complained on numerous

occasions that the Church was not having janitorial and maintenance services performed in an acceptable fashion. Id., Exhibits 15, 16.) The SLA, as proposed by the contracting officer, read as follows:

> WHEREAS, the parties hereto desire to amend the above Lease.
>
> NOW THEREFORE, these parties for the considerations hereinafter mentioned covenant and agree that the said Lease is amended effective **May 15, 1999** as follows:
>
> To extend the current lease for a period of 3 years 2 years firm, and delete Maintenance and Janitorial Services. Accordingly paragraph 9 [regarding the lease term] and paragraph 12 [establishing a base rate for operating cost adjustments] are hereby deleted in their entirety and the following substituted therefore [sic]:
>
> "9. TO HAVE AND TO HOLD the said premises with their appurtenances for the term beginning on May 15, 1999 through May 14, 2002."
>
> "12. For the purpose of Maintenance and Janitorial Services the Government will deduct the amount of $48,971.60 from the Annual Rent of $251,475.80. The deduction is based on the cost of annual Janitorial Services, Maintenance Service, and Administration Fee the Government will have to pay during the term of the lease. As of May 15, 1999 the Government shall pay the lessor an annual rent of $202,504.20 at the rate of $16,875.35 per month with no CPI [consumer price index] increase during the term of the lease."
>
> All other terms and conditions of the lease shall remain in force and effect.

Id., Exhibit 17 at 3.

7. The Church did not accept this proposal. Instead, its attorney responded by making two principal points. First, he objected to the amount of the deduction as excessive in light of the costs the Church had been incurring for janitorial and maintenance services. Second, he maintained that consideration of service costs aside, the rent on the property should be increased. In support of the second point, he asserted that rents in the region had been increasing and said that the Church expected to receive higher rental income from its own property. He added, "The Church, we believe, even on a worst-case basis, is entitled to some upward adjustment in the basic monthly rent, according to the 1999 indexes." Appellant's Exhibit 2 at 2.[1] On May 14, the attorney sent the contracting officer a counter-offer: "The annual rental will be $251,475.80, payable in monthly installments of $20,956.32. Beginning May 15, 1999, however, Lessor shall have no further responsibility for the payment of Janitorial Services and Maintenance Services under the aforementioned Lease." Appellant's Exhibit 3 at 1. To effectuate his counter-offer, the attorney sent the

[1]Appellant's exhibits 1 through 11 were submitted as attachments to its notice of appeal. Appellant's exhibits 12 and 13 were submitted on July 18, 2003.

contracting officer a version of the SLA which was identical to hers except that paragraph 12 read as follows, with material added in pen shown here in bold print:

> "12. ~~For the purpose of Maintenance and Janitorial Services the Government will deduct the amount of $48,971.60 from the~~ Annual Rent of $251,475.80. ~~The deduction is based on the cost of annual Janitorial Services, Maintenance Service, and Administration Fee the Government will have to pay during the term of the lease.~~ As of May 15, 1999 the Government shall pay the lessor an annual rent of ~~$202,504.20~~ **$251,475.80** at the rate of ~~$16,875.35~~ **$20,956,32** per month with no CPI increase during the term of the lease."

Id. at 2.

8. On May 17, 1999, the parties agreed to SLA number 9. This SLA is identical to the one proposed by the contracting officer except that paragraph 12 – the one proposed to be modified by the Church's attorney – reads as follows:

> "12. The deduction is based on the cost of annual Janitorial Services, Maintenance Service, and Administration Fee the Government will have to pay during the term of the lease. As of May 15, 1999 the Government shall pay the lessor an annual rent of $251,475.80 at the rate of $20,956.32 per month with no CPI increase during the term of the lease."

Appeal File, Exhibit 10. The record contains no information as to what negotiations, if any, transpired between the submission of the Church's counter-offer and the parties' agreement to SLA 9.[2]

9. By letter dated December 11, 2001, a GSA contracting officer wrote to the Church: "Pursuant to Paragraph Number 4 [of the lease], the Government gives notice that effective midnight, January 28, 2002, the . . . Lease . . . shall terminate and no rent shall be paid after that date." Appeal File, Exhibit 13. The Government vacated the premises on approximately January 28, 2002. Complaint ¶ 6; Answer ¶ 6.

10. Following the agreement to SLA 9, with five exceptions, GSA paid the Church rent in the amount of $20,956.32 in each month through and including February 2002. Two of the exceptions are immaterial: the payments in June 1999 and July 1999, while not equal, total two times $20,956.32. The three other exceptions occurred in January 2000, when GSA paid the Church $10,956.32; August 2001, when it paid $729.32; and September 2001, when it paid $13,425.49. Complaint ¶ 7; Answer ¶ 7; Appeal File, Exhibit 19 at 3-8.

11. A GSA internal record shows that with regard to the January 2000 payment, GSA withheld $10,000 "for lessor default – janitorial and mechanical services."

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[2]The parties submitted the case for decision on the basis of the written record alone. Consequently, the Board did not conduct a hearing in the case. Rule 111 (48 CFR 6101.11). Neither the appeal file nor the exhibits submitted by the parties contain any evidence as to further negotiations.

Respondent's Brief, Attachment 1. GSA has not provided any documentation of payment of $10,000 to any person for any services at the building in question.

12. When the Church received the January 2000 payment, its pastor objected to GSA's deduction of $10,000 from the regular monthly rent and asked that the money be paid immediately. Appellant's Exhibit 5. The contracting officer replied (by letter dated February 25, 2000) that $10,000 represented the estimated costs of janitorial and maintenance services which GSA had incurred for the months of October and November 1999. She asserted that when GSA agreed to SLA 9, "it was understood that we would recoup [janitorial and maintenance] costs. Rather than reduce the rent based on the estimated cost of these contracted services ($60,000 per year, $5,000 per month), GSA kept the rent payments in place so that deductions could be made as actual costs became known." She also stated that $2,600 would be withheld from the February 2000 rental payment to cover "the amount our field office spent for janitorial and mechanical maintenance of the facility." Appellant's Exhibit 6.

13. A GSA internal record shows that with regard to the August 2001 payment, GSA withheld $20,227 "for lessor default . . . ($23,979.00 (janitorial) + $1,248.00 (trash removal) - $5,000.00 (Nov withhold)." Id., Attachment 4. GSA has shown that in May 2000, it issued a requisition for the provision by a contractor of janitorial services at the building for a one-year period (May 17, 2000, through May 16, 2001) in exchange for $23,979.24. Also in May 2000, GSA issued an order with another contractor for trash removal service at the building for a one-year period in exchange for $1,248. Appellant's Exhibit 8 at 6-9; Respondent's Brief, Attachments 2, 3.

14. With regard to the September 2001 payment, GSA's brief says that "[r]ent was withheld for costs incurred by GSA for maintenance services performed by other contractors prior to the due date of the September rent totaling of [sic] $7,530.83." Respondent's Brief at 6. The supporting documentation to which counsel directs us shows payments to contractors in the amount of only $3,147.47, however. Id., Attachment 5.

15. By letter dated August 13, 2001, the Church made a claim for the amounts GSA had withheld from regular monthly rent payments. The letter, written by the Church's attorney, asserted, "[The contracting officer's] understanding of these recoupable costs is not in writing nor is it reflected anywhere in the recorded history of the negotiations attendant to the Supplemental Lease Agreement No. 9 in 1999." Appellant's Exhibit 7 at 1.

16. By decision dated November 5, 2001, the contracting officer denied the claim. She wrote:

> The lease payments prior to SLA 9 were $251,475.80 for a fully serviced lease. The costs of the services assumed by GSA were charged against the rent since GSA was no longer benefiting from a fully serviced lease. The contract services for janitorial, trash hauling and mechanical services totaled $25,227.40 per year. The deductions were to be charged in monthly increments of $2102 per month instead of lump sum amounts, as was recently done.

> . . . For the remainder of the lease, . . . [the Church] should . . . budget for a net rent of $18,854.32 per month ($20,956.32 less $2,102.00).

Appellant's Exhibit 8 at 1. The contracting officer attached to the decision copies of the requisition and order noted in Finding 13. Id. at 6-9; see also Respondent's Brief, Attachments 2, 3.

17. The contracting officer's November 5, 2001, decision does not advise the Church of its appeal rights. The contracting officer restated her decision, and included a notice of appeal rights, by letter dated October 21, 2002. The restated decision was sent to the Church's attorney at an address from which he had moved a year and a half earlier, and he did not receive the decision until February 19, 2003. Notice of Appeal at 1 n.1 (uncontested).

18. Meanwhile, on May 20, 2002, the Church made a claim for the amounts GSA had withheld from the monthly rent payments made in January 2000, August 2001, and September 2001 (totaling $37,757.83) and the amount of regular monthly rent payments for March, April, and half of May 2002 (totaling $52,390.80). Appellant's Exhibit 10. The claim was sent to the contracting officer at an address from which she had moved, and she did not receive it. Notice of Appeal at 1 n.1 (uncontested).

19. The Church filed its notice of appeal on May 14, 2003. The appeal was from both the contracting officer's decision dated October 21, 2002 (and received by the Church's agent on February 19, 2003) and from a deemed denial of the claim dated May 20, 2002. Notice of Appeal at 1-2. Because the October 2002 decision does not mention the May 2002 claim, the Board was concerned that the contracting officer had never seen that claim. By orders dated July 15 and 22, 2003, 2e asked GSA counsel to send the claim to the contracting officer for a decision by her on it. A decision denying the May 2002 claim was submitted to the Board on July 31, 2003.

Discussion

The Church makes claims for two separate matters in this appeal: the amounts GSA withheld from regular monthly rent payments for January 2000, August 2001, and September 2001, totaling $37,757.83; and the amount of regular monthly rent payments for the last two and one-half months of the period by which the lease was extended, totaling $52,390.80.

Withholdings from January 2000, August 2001, and September 2001 monthly rent payments

Whether the Church is entitled to the amounts GSA withheld is dependent on the Board's interpretation of paragraph 12 of the lease, as revised in SLA 9. This paragraph reads:

> The deduction is based on the cost of annual Janitorial Services, Maintenance Service, and Administration Fee the Government will have to pay during the term of the lease. As of May 15, 1999 the Government shall pay the lessor an annual rent of $251,475.80 at the rate of $20,956.32 per month with no CPI increase during the term of the lease.

If we construe this paragraph to permit GSA to withhold from regular monthly payments of $20,956.32 the amounts the agency spent on janitorial and maintenance services (and associated administrative costs) during the period of time specified by the SLA, the claim fails. On the other hand, if we construe the paragraph to specify a required monthly payment of $20,956.32, with the words "[t]he deduction" at the beginning of the first sentence referring to a deduction from something other than that payment, the claim succeeds.

The parties understand that in interpreting this (or any other) provision of a lease, the Board should begin with the plain language of the agreement, giving a reasonable meaning to all of its parts and effectuating its spirit and purpose. See, e.g., James A. Prete v. General Services Administration, GSBCA 15724, et al., 03-1 BCA ¶ 32,163, at 159,028, appeal docketed, No. 03-1321 (Fed. Cir. Apr. 3, 2003) (citing decisions of Court of Appeals for the Federal Circuit); 9th & D Joint Venture v. General Services Administration, GSBCA 13418, 96-2 BCA ¶ 28,304, at 141,327-28, aff'd, 108 F.3d 1394 (table) (Fed. Cir. 1997) (same).

Unfortunately, as paragraph 12 is written, its language is not plain at all. The principal problem is that the first sentence begins with the phrase, "The deduction," but it does not tell us the amount of that deduction or the base from which the deduction is taken. To give a reasonable meaning to all of the parts of the paragraph, and effectuate the SLA's spirit and purpose, we will have to look to the negotiations which led to the agreement.

Prior to the parties' agreement to SLA 9, GSA had been paying the Church rent in the amount of $251,475.80 per year (or $20,956.32 per month) in exchange for office and related space, as well as janitorial and maintenance services for that space. In proposing the SLA, the contracting officer made clear that if the lease were to be extended, GSA would insist on assuming the responsibility for securing these services and desired that the then-current rent be reduced by the anticipated cost of the services. The Church's attorney accepted the Government's assumption of the responsibility for janitorial and maintenance services, but rejected the proposed change to the rental rate. He not only objected to the proposed amount of the reduction as excessive, but also urged that the base rental rate – which was just 4.5% more than it had been seven years earlier – be raised to reflect increased rental rates in the area (or at least increased operating costs). After the attorney gave a counter-offer to the contracting officer, the parties agreed on paragraph 12.

Reading the paragraph in light of this history, we can give a reasonable meaning to the provision and effectuate the SLA's spirit and purpose only by coming to the following conclusions: The paragraph specifies a required monthly rental rate. The only base from which "[t]he deduction" might be taken is a higher rental rate, one more appropriate in the 1999 real estate market (or at least one incorporating increases resulting from operating cost adjustments). The cost to the Government of paying for janitorial and maintenance services (including administrative fees) was effectively agreed by the parties to be equal to the difference between a fair, higher rental rate and the rate which GSA had been paying. In our judgment, reading the paragraph as GSA does, to permit the Government to take deductions from the stated rental rate to account for service costs, would be unreasonable because it would ignore the second sentence's command that "the Government shall pay the lessor an annual rent of $251,475.80 at the rate of $20,956.32 per month."

Because GSA was obligated to pay the Church $20,956.32 in monthly rent, the agency's determinations to withhold from monthly payments $10,000 in January 2000 (when it paid only $10,956.32), $20,227 in August 2001 (when it paid only $729.32), and $7,530.83 in September 2001 (when it paid only $13,425.49) were improper. The agency must now pay these amounts – totaling $37,757.83 – to the Church. The first claim addressing this matter was sent to the contracting officer by letter dated August 13, 2001. As mandated by the Contract Disputes Act of 1978, GSA must also pay the Church interest on the claim from the date on which the contracting officer received the letter. 41 U.S.C. § 611 (2000).

We note that even under its own, unreasonable interpretation of paragraph 12, GSA's actions were inconsistent and the total amount of the deduction available to it would be less than the amount it took.

The inconsistencies are manifest. The contracting officer said in May 1999 that the total costs of janitorial and maintenance services would be $48,971.60 per year. In February 2000, she said that they would be $60,000 per year. The January 2000 deduction of $10,000 was based on estimated costs, but in responding to the Church's letter asking about them, the contracting officer said that deductions would only be made "as actual costs became known." She told the Church that $2,600 would be deducted from the February 2000 payment to cover actual costs, but no deduction was made from that payment. The deduction from the August 2001 payment was reduced by $5,000 (which was said to cover an amount withheld for November, evidently 1999), but not by an equal amount which GSA had withheld for October 1999. The deduction from the September 2001 payment was $7,530.83, but the documented costs for that month were only $3,147.47. In November 2001, the contracting officer told the Church that GSA would make a deduction in the amount of $2,102 from each monthly rental payment for the remainder of the lease, but GSA made no deductions from any later payments. Finally, in January 2000 and again in August 2001, GSA used the term "lessor default" to describe the Church's failure to pay for janitorial and maintenance services, but because the lease as amended by SLA 9 did not require the Church to pay for such services, the failure to pay could not possibly have been a default.

As far as our record goes, the only costs GSA incurred for janitorial and maintenance services during the entire period of time encompassed by SLA 9 were $23,979 for janitorial services, $1,248 for trash removal, and $3,147.47 for maintenance services. The total of $28,374.47 is the most that the agency could legitimately have deducted from rental payments even if we had accepted its interpretation of the contested paragraph 12.

Absence of payments for March, April, and May of 2002

SLA 9 extended the lease from May 17, 1999, for a period of "3 years 2 years firm." GSA gave notice on December 11, 2001, that the lease would terminate on January 28, 2002, and the Government vacated the premises on the latter date. GSA did not pay rent for March, April, or May of 2002. The Church claims that the agency is obligated under the terms of the lease to make rental payments of $52,390.80 for these last two and one-half months of the extension period.

SLA 9 states that with the exception of the lease paragraphs its provisions specifically replace, "[a]ll other terms and conditions of the lease shall remain in force and effect." One of those terms and conditions is paragraph 4, which states:

> The Government may terminate this lease after the initial term at any time by giving at least 60 days' notice in writing to the Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the day after the date of mailing.

The key issue here is whether the date of termination, in early 2002, was "after the initial term" of the lease. The initial term of the original lease ended on May 14, 1992. Obviously, the date of termination was after that date. As the Church points out, however, we are dealing here with SLA 9, and paragraph 4 must be viewed with respect to that SLA. If the paragraph is not so viewed, the SLA's distinction between "2 years firm" and the third less-than-firm year makes no sense – the lease could be terminated at any time during the three-year period, even during a "firm" year. GSA terminated the lease, after notice, after SLA 9's initial term of "2 years firm" (which ended on May 14, 2001). The termination was therefore permissible under paragraph 4. Consequently, the agency is not liable for payment of rent after the date of termination.

The Church has urged us to view the lease period specified in SLA 9 as one single, and therefore "initial" term. From this perspective, no termination would be possible within any part of the period. Consistent with our analysis in the preceding paragraph of this decision, we reject this theory because it leaves lease paragraph 4 devoid of meaning during the SLA 9 period. The Church has also suggested that SLA 9 could be construed to read that if GSA did not terminate the lease at the end of the second year of the three-year extension period, it was foreclosed from terminating at any time during the third year. We find no support for this theory, either. SLA 9 does not expressly limit GSA's rights in this way, and the Church has referenced no legal authority which would mandate such a limitation.

GSA recognizes that it did err in one way with regard to the termination. Paragraph 4 requires that the Government give the Church sixty days' notice of termination, and by giving notice on December 11, 2001, and vacating the premises on January 28, 2002, the agency effectively gave less than sixty days' notice. GSA acknowledges that to make its notice of sixty days' duration, it must pay the Church rent for the days from January 29 through the sixtieth day after December 11. Respondent's Brief at 13. GSA's brief states that "[i]n May 2002 GSA paid Grant AME $10,478.16 to make up for the 14 days that GSA was short of the 60 day notice requirement." Id. at 6. We do not know whether this payment was actually made, however. The brief says that exhibit 13 of the appeal file contains supporting documentation. Exhibit 13 has nothing to do with payments made, however; it contains only GSA's notice of termination and a receipt showing that the Church received the notice. We cannot find anywhere in the record any support for the assertion that GSA paid the Church any amount of money for any reason in May 2002. On the other hand, the Church's reply brief does not object to the statement that the alleged payment was made.

This last matter is not covered by the Church's claim, which insofar as it addresses rent for the last part of the SLA 9 period demands payment for only the months of March, April, and May of 2002. Nevertheless, we suggest that the parties may wish to review their

records and ensure that proper payment for the last part of the period was or is made. In this regard, we note that GSA vacated the premises twelve days short of the sixtieth day after December 11, 2001 (not fourteen days, as thought by GSA); and that by making payment in February 2002 of the full month's rent for January, GSA has already paid rent for three of those days (January 29-31).

Decision

The appeal is **GRANTED IN PART**. GSA shall pay to Grant African Methodist Episcopal Church the sum of $37,757.83. GSA shall also pay to the Church interest on this amount from the date on which the contracting officer received the Church's August 13, 2001, claim until the date of payment. 41 U.S.C. § 611.

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STEPHEN M. DANIELS
Board Judge

I concur:

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CATHERINE B. HYATT
Board Judge